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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1001

NOWLIN RANDOLPH, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI

To the United States Circuit Court of Appeals For the Fifth Circuit

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit.

Opinions Below

Neither the opinion of the Circuit Court of Appeals (R. 40-41) nor that of the District Court (R. 31-34) has yet been reported.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on November 15, 1946. The jurisdiction of this Court is invoked under Section 240(a) of the JUDICIAL CODE, as amended by the Act of February 13, 1925.

Question Presented

Whether petitioner, a former reserve officer of the Army (and thousands of other reserve officers, whose rights are vitally affected by this, the first case involving their right to retirement pay) may sue in the District Court under the principles enunciated by this Court in DISMUKE v. UNITED STATES, 297 U.S. 167, and similar cases, to recover the retirement pay provided by Congress in Section 5 of the Act of April 3, 1939, as amended, when he is deprived of such pay by the arbitrary, discriminatory and capricious acts of those charged with administering that statute, such conduct being aimed at preventing petitioner in particular and reserve officers in general from obtaining the benefits promised them by Congress.

Statute Involved

Section 5 of the Act of April 3, 1939 (53 STAT. 555), as amended by the Act of July 25, 1939 (53 STAT. 1079), and the Act of December 10, 1941 (55 Stat. 796), also found as 10 U. S. C. A. 456, is as follows:

> "That all officers, warrant officers and enlisted men of the Army of the United States, other than the officers and enlisted men of the Regular Army, if called or ordered into the active military service by the Federal Government for extended military service in excess of 30 days, other than for service with the Civilian Conservation Corps, and who suffer disability or death in

line of duty from disease or injury while so employed shall be deemed to have been in the active military service during such period and shall be in all respects entitled to receive the same pensions, compensation, retirement pay, and hospital benefits as are now or may hereafter be provided by law or regulation for officers and enlisted men of corresponding grades and length of service of the Regular Army, including for their dependents the benefits of the Act of December 17, 1919 (41 Stat. 367), as amended."

Statement

In a twelve-line opinion the Circuit Court of Appeals without discussion held that the petitioner (and the thousands of reserve officers whose cases will be controlled by the decision in this case) cannot bring suit for retirement pay in the courts of the United States. The importance of the question involved merits a more thorough consideration and a more detailed discussion of the legal questions presented.

The District Court sustained a motion to dismiss for the reason that the United States has not consented to be sued in this type of case. The allegations of the Second Amended Complaint must therefore, for present purposes, be accepted as true.

On July 23, 1946, petitioner filed his Second Amended Complaint in the United States District Court for the Southern District of Texas to recover accrued retirement pay in the sum of $3200.00 (R. 19-30), alleging active duty status in good health as a reserve officer, commencing in 1940, illness in the occupation of New Caledonia in 1942, followed by hospitalization during much of the ensuing three years, during which time he received more than one hundred forty tests and examinations, was four times found (and was in fact as a matter of law) incapacitated for active duty as an incident of service and disabled in line of duty, and, follow-

ing the finding of a retiring board, was ordered to his home, only to be ordered back for further tests and examinations, after he had resumed civilian status at great expense. The complaint further alleges that his failure to receive retirement pay was occasioned by the denial of his claim by the arbitrary, discriminatory and capricious acts, omissions and conduct of those persons administering retirement pay, such persons favoring Regular Army officers and opposing reserve officers, not more than five per cent of the latter who had appeared before retiring boards having been granted retirement pay while ninety per cent of the Regular Army officers who had appeared before the retiring boards had received it, the deprivation of reserve officers in general and petitioner in particular having been accomplished by the following devices: (1) Long hospitalization. (2) The giving of innumerable tests and examinations. (3) The ordering of repeated hearings before disposition boards and retiring boards. (4) The failure to arrive at any character of decision. (5) The substitution for the standard of physical incapacity prescribed for Regular Army officers (that is, whether the officer is physically able to perform all of his duties in peace or in war) of an illegal requirement that a reserve officer must not merely be incapacitated for active service but must also be totally and permanently disabled so that he is wholly unable to do any kind of work. (6) The practice of requiring a reserve officer to return for further examination after he has completed his active duty, has again become a civilian, and has involved himself in the costly and difficult process of attempting to readjust himself to civilian life.

The petitioner, a member of the Officers' Reserve Corps, was ordered to active duty September 12, 1940, such service necessitating the abandonment of his law practice and the removal of himself and his family from Texas to Washington at a time when the country was still technically at peace.

Two complete physical examinations were given the petitioner at about the time he entered on active duty, and none of the ailments which thereafter incapacitated him were found to exist, and they did not exist (R. 22).

He first became ill on New Caledonia in July 1942, and until March 1945, he was frequently hospitalized. The earlier places of hospitalization and the approximate number of tests and examinations given at each are: New Caledonia, 16; Melbourne, Australia, 15; The Presidio, California, 6; Clinton, Iowa, 27; Ft. Sam Houston, Texas, 14; unspecified locality, 23; Santa Ana, California, 13 (R. 25-26). In September 1944, petitioner was directed to appear before a retiring board and was informed by responsible medical officers that the decision of such board awarding him retirement pay might be regarded as a foregone conclusion, and that he should utilize a month's sick leave then given him to prepare to return to civilian life. Despite his compliance with these instructions, he was placed before a retiring board on October 19, 1944, and, without being informed of any change in plan, was restored to duty (R. 26-27).

The War Department disapproved of this procedure and, in effect, directed his retirement. At a hearing before a second board he was found incapacitated for active duty as an incident to his service and was, on March 7, 1945, placed on terminal leave and returned to his home. His terminal leave expired May 13, 1945, and he again became a civilian. But on June 11, 1945, he was required to report to Brooke Hospital Center for further medical study and was there given at least twenty-six more tests and examinations. On August 22, 1945, he was directed to go before another retiring board. He challenged the legality of these orders, and thereafter orders were issued relieving him from duty as of August 1, 1945 (R. 27-28).

By June 22, 1945, petitioner had been under military medi-

cal treatment for almost three years, had appeared before two retiring boards and had had at least one hundred and forty tests and examinations. Competent civilian physicians consider such hospitalization so long and such tests and examinations so numerous that any reasonably skilled physician should arrive at a decision in petitioner's favor without the necessity of further examination. Yet the third retiring board was ordered for the purpose of restoring him to duty for further tests and examinations, not because further study was necessary but solely to defeat his claim to retirement pay by inaction, needless examination, delay and oppressive tactics (R. 28-29).

Specification of Errors to be Urged

1. The Circuit Court of Appeals erred in affirming the District Court's dismissal of petitioner's suit for want of jurisdiction.

2. The Circuit Court of Appeals erred in not following the holding of this Court in DISMUKE v. UNITED STATES, 297 U.S. 167, that a suit for retirement pay may be maintained by one who has been deprived of such pay by the arbitrary, discriminatory and capricious acts of those administering the Act of Congress.

Reasons for Granting the Writ

If the discriminatory practices followed by the persons charged with the administration of reserve officers' retirement pay (which are fully demonstrated in this case) are permitted to go unchallenged, and if the decisions of the District Court and of the Circuit Court of Appeals are allowed to stand, then the result will be, in effect, a repudiation in time of peace of the statutory promise of retirement pay held out by the United States in time of war.

This is the first case brought under the Act of April 3, 1939 which has reached this Court. In view of the fact that many thousands of former reserve officers of the Army of the United States are bound by whatever action this Court may take, this Court should grant the writ for the purpose of examining and determining the law with reference to the rights of reserve officers under the statute mentioned. This is particularly necessary in view of the fact that the Circuit Court of Appeals did not discuss the questions involved but disposed of the matter in a twelve-line memorandum opinion.

The government protects the laborer in countless rights relating to his employment, it provides innumerable benefit payments to the farmer, and it protects the business man in his contracts; as to all of these matters, the courts of the United States are open to its citizens. The courts should not permit a soldier to be deprived of disability benefits by the arbitrary, discriminatory and capricious action of administrative officers who seek to hide behind the pretense and cloak of procedural forms which were made to promote justice—such forms being never intended to thwart justice by preventing partial restitution to a soldier who has given of his body so that all the good things of this country may continue to prosper under a government of laws and not of men.

The discrimination against reserve officers in this respect is no new matter. As revealed in the Congressional debates at the time this bill was pending, some persons in the War Department were then opposing retirement pay for reserve officers just as they had always opposed putting reserve personnel on the same footing with the Regular Army (Congressional Record, February 15, 1939, page 1436; March 6, 1939, pages 2286 and 2288). Those persons in the War Department who opposed the bill were apparently not satisfied to accept their defeat in Congress but carried forward their fight against it by ignoring its plain provisions in the administration of the act.

The lower courts refused to follow the plain import of this Court's decision in DISMUKE v. UNITED STATES, 297 U.S. 167—a suit for retirement pay under the Civil Service Retirement Act.

The statute in the DISMUKE case provides that an employee "SHALL BE ENTITLED" to an annuity. The statute in this case, Section 5 of the Act of April 3, 1939, upon which petitioner bases his suit, provides that petitioner "SHALL BE ENTITLED" to retirement pay.

In that case the court said:

> "Section 8(a) of the Retirement Act declares that, under conditions specified, the employee 'shall be entitled to an annuity payable from the civil-service retirement and disability fund.' The provision is mandatory, expressed in terms of the right of the employee, which is inseparable from the correlative obligation of the employer, the United States. The present suit to recover the annuity is thus upon a claim 'founded upon a law of Congress' and is within the jurisdiction conferred upon district courts, as are suits to recover sums of money which administrative officers are directed by Act of Congress to 'pay' or 'repay.' "

The court further said, in speaking of the exercise of authority by an administrative officer:

> "If he is authorized to determine questions of fact his decision must be accepted unless he exceeds his authority by making a determination which is arbitrary or capricious or unsupported by evidence, * * * or by failing to follow a procedure which satisfies elementary standards of fairness and reasonableness essential to the due conduct of the proceeding which Congress has authorized. * * * But the power of the administrative officer will not, in the absence of a plain command, be deemed to extend to the denial of a right which the statute creates, and to which the claimant, upon facts found or admitted by the administrative officer, is entitled."

The *ultima Thule* of administrative discrimination is revealed in petitioner's case. He was tested and examined at least one hundred and forty times over a period of three years in hospitals in New Caledonia, Australia, California, Iowa, Texas, California again, and Texas again. The number of examinations was more than adequate to determine his condition, and these examinations showed his disability in line of duty as a matter of law, and further tests and examinations would serve no medical purpose but would be needed only to accomplish the desire of administrative officers to defeat his claim by inaction and delay. Yet, after petitioner had been found incapacitated in line of duty by a retiring board and after he had returned to civilian status and had spent money and time to try to readjust himself to civilian life, he was ordered back for further testing. Two months after this experience, he was again ordered before another retiring board (he had already been before two retiring boards) for the sole purpose of restoring him to duty so that he might be tested and examined for another long period of time and so that his claim might be defeated—not on the merits, but by dilatory tactics. The power of the persons whom the Secretary of War had, under Executive Order No. 8461, June 28, 1940, designated to administer this act was used solely for the purpose of oppression and not for the legitimate purpose of determining the merits of petitioner's claim, for they had long known that the claim was meritorious.

The action or inaction of these administrative officers constituted an unjust, long-continued refusal to act, amounting to a denial of his claim and giving the Federal courts jurisdiction of a suit on such claim within the doctrine of CAMPBELL v. UNITED STATES, 107 U.S. 407.

The War Department has never questioned the justice of petitioner's claim. On the contrary, the only official statement

by the War Department was a directive from the Adjutant General which said, in effect, that he should be paid; on at least four separate occasions he has been found by army agencies to be incapacitated for active service in line of duty. He has been denied retirement pay by the arbitrary, discriminatory and oppressive tactics of a few administrative officers, and he has been denied such pay for no other reason.

For more than sixty years Regular Army officers have brought suits in the Federal courts for their retirement pay. Their right to bring such suits has never been challenged on the ground that the United States has not consented to be sued. WOOD v. UNITED STATES, 107 U.S. 414. LEONARD v. UNITED STATES, 279 U.S. 40. CLOUD v. UNITED STATES, 43 Ct. Cl. 69. RALSTON v. UNITED STATES, 91 Ct. Cl. 91; certiorari denied, 311 U.S. 687. The Act of Congress under which petitioner claims contains a specific provision that he must have the same retirement pay rights as a Regular Army officer. What shall it avail him to have the same rights if he does not have the same remedies?

The U. S. attorney claimed that the petitioner should take an appeal under Section 302(a) of the "G. I. Bill of Rights," (Act of June 22, 1944, 58 STAT. 287). But an appeal under that section can be taken only where the retiring board finds against the claimant. No appeal is provided where the retiring board (as here) finds in favor of the claimant and payment is withheld solely because of acts, omissions and conduct of the kind mentioned in the Second Amended Complaint.

The U. S. attorney also contended that this is a suit for a pension and hence is excluded under the specific provisions of the Tucker Act. But retirement pay is not a pension. Congress recognized that when it provided in the very statute upon which this suit is based that military personnel should be entitled to the same "pensions and retirement pay" as the

Regular Army. Retirement pay is determined by rank and length of service and whether the officer is incapacitated for active duty as an incident of service. But a pension is determined solely by the degree of disability. The retirement pay statutes are found in Title 10, U. S. C. A., while the pension statutes are all found in Title 38, U. S. C. A. Finally, it is again pointed out that Regular Army officers have sued for retirement pay during all the time that the Tucker Act has been in effect and that their retirement pay has never been called a pension.

The U. S. attorney also asserted that this claim constitutes compensation for the official services of an officer of the United States. But the Act of June 15, 1933 (48 STAT. 154, 10 U. S. C. A. 372), provides that a member of the Officers' Reserve Corps, while not on active duty, is not an officer of the United States. Also, it is quite clear that retirement pay is not compensation for official services because the term "official services" includes only those services which are peculiar to the office of an officer of the United States and which such officers are by law authorized or required to perform. SCULLY v. UNITED STATES, 193 Fed. 185. By his suit this petitioner does not seek to recover compensation for official services. He seeks to recover retirement pay. Retirement pay is a reimbursement for bodily damage, not a payment for work.

The Circuit Court of Appeals cites three cases. UNITED STATES v. BEAMAN, 61 Fed. (2d) 493 was a two to one decision of the Fifth Circuit itself; no petition for writ of certiorari was presented to this Court. There are several distinctions between the BEAMAN case and the DISMUKE case; but petitioner concedes that the BEAMAN case is basically in conflict with this Court's opinion in the DISMUKE case, just as was the Fifth Circuit's opinion in the DISMUKE case in conflict with this Court's opinion in that case, and petitioner

asserts that these two opinions of the Fifth Circuit were, in effect, overruled by this Court in the DISMUKE case. The second case cited by the Circuit Court of Appeals is MORGAN v. UNITED STATES, 115 Fed. (2d) 426. That was a suit not for retirement pay but for death compensation payments to a widow; it does not appear to have been carried from the Fifth Circuit to this Court. The third case cited was SMITH v. UNITED STATES, 57 Fed. (2d) 998. That was a suit for adjusted service compensation. The three cases cited by the Circuit Court of Appeals do not deal with retirement pay.

In twelve lines the Circuit Court of Appeals has disposed of the retirement pay rights of petitioner and thousands of former reserve officers who are similarly situated. These citizens who trained themselves for military service in time of peace and who abandoned their livelihoods in time of war and who devoted years to the service of this country are entitled under the law to have at least as much access to the courts as do Regular Army officers. It is submitted that these individuals are entitled to a favorable decision in this case and that they are entitled to an exposition of the law by this Court for their future guidance.

Conclusion

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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